No. 82-7003

Office - Supreme Court, U.S.
FILED
AUG 1 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

IVON RAY STANLEY,

Petitioner,

v.

WALTER D. ZANT, WARDEN,
GEORGIA DIAGNOSTIC AND
CLASSIFICATION CENTER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR THE RESPONDENT

MICHAEL J. BOWERS
Attorney General

JAMES P. GOOGE, JR.
Executive Assistant
Attorney General

MARION O. GORDON
First Assistant
Attorney General

WILLIAM B. HILL, JR.
Senior Assistant
Attorney General

SUSAN V. BOLEYN
Assistant Attorney General

Please serve:

SUSAN V. BOLEYN
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3397

QUESTIONS PRESENTED

I.

Whether the United States Court of Appeals for the Eleventh Circuit properly determined that Petitioner had failed to establish that his trial attorney rendered ineffective assistance during the sentencing phase of Petitioner's trial?

II.

Whether the United States Court of Appeals for the Eleventh Circuit properly determined that Petitioner's statement was properly introduced at trial, as the record showed that prior to the giving of his statement, Petitioner was thoroughly advised of his right to consult with an attorney before making any statement and as the record indicated that Petitioner understood his rights and was willing to make a statement freely and voluntarily?

III.

Whether the United States Court of Appeals for the Eleventh Circuit properly determined that this Court's decision in Godfrey v. Georgia, 446 U.S. 420 (1980) did not require limiting instructions by the trial court concerning the seventh aggravating circumstance, in light of the actual instructions given at Petitioner's trial?

TABLE OF CONTENTS

	Page(s)
QUESTIONS PRESENTED FOR REVIEW	ii
STATEMENT OF THE CASE	1
REASONS FOR NOT GRANTING THE WRIT	4
I. THE UNITED STATES COURT OF APPEALSFOR THE ELEVENTH CIRCUIT PROPERLY FOUND THAT, UNDER THE FACTS OF THIS CASE, PETITIONER HAD FAILED TO PROVE THAT HIS TRIAL ATTORNEY RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE, WITHOUT REFERENCE TO THE ISSUE OF "PREJUDICE."	4
II. THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT PROPERLY DETERMINED THAT THERE WAS NO SHOWING THAT PETITIONER'S STATEMENT WAS NOT FREELY AND VOLUNTARILY GIVEN SO AS TO WARRANT ITS EXCLUSION FROM EVIDENCE BASED ON THE FACTS BEFORE THE COURT.	9
III. THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT PROPERLY FOUND THAT THIS COURT'S DECISION IN GODFREY V. GEORGIA, 446 U.S. 420 (1980), DID NOT REQUIRE A LIMITING INSTRUCTION AND FURTHER PROPERLY DETERMINED THAT PETITIONER HAD FAILED TO ESTABLISH THAT ANY ALLEGED DEFICIENCIES IN THE INSTRUCTION ON THE SEVENTH AGGRAVATING CIRCUMSTANCE WARRANTED THE GRANTING OF HABEAS CORPUS RELIEF..	11
CONCLUSION.	14
CERTIFICATE OF SERVICE	15

TABLE OF AUTHORITIES

Cases cited:	Page(s)
Brewer v. Williams, 430 U.S. 387 (1977). . . .	11
Burston v. Caldwell, 506 F.2d 24 (5th Cir.), cert denied, 421 U.S. 990 (1975). .	6
Clayton v. Blackburn, 578 F.2d 117 (5th Cir. 1978)	6
Eddings v. Oklahoma, 455 U.S. 104 (1982) . . .	6
Engle v. Isaac, 456 U.S. 107 (1982).	13
Godfrey v. Georgia, 446 U.S. 420 (1980). . . .	ii, 11, 12
Gray v. Lucas, 677 F.2d 1086 (5th Cir. 1982) .	7,
Lakos v. Capps, 528 F.2d 576 (5th Cir. 1976) .	7,
Lockett v. Ohio, 438 U.S. 586 (1978)	6
Miranda v. Arizona, 384 U.S. 436 (1966). . . .	9, 11
Stanley v. State, 240 Ga. 341, 241 S.E.2d 173 (1977), cert denied, 439 U.S. 882 (1978)	1,
Stanley v. Zant, 444 U.S. 1103 (1980).	Passim
Stanley v. Zant, 697 F.2d 955 (11th Cir. 1983).	Passim
Washington v. Strickland, 693 F.2d 1243 (5th Cir. 1982) (Unit B en banc)	4, 7
Williams v. Maggio, 679 F.2d 381 (5th Cir. 1982 (en banc)	7, 7
Woodson v. North Carolina, 428 U.S. 280 (1976)	6

Statutes Cited

28 U.S.C. § 2254

No. 82-7003

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

IVON RAY STANLEY,

Petitioner,

v.

WALTER D. ZANT, WARDEN,
GEORGIA DIAGNOSTIC AND
CLASSIFICATION CENTER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR THE RESPONDENT

PART ONE

STATEMENT OF THE CASE

Petitioner, Ivon Ray Stanley, along with Joseph Thomas, was convicted for the April 12, 1976 murder of Clifford Floyd. Petitioner was convicted by a jury of murder, armed robbery and kidnapping with bodily injury. Briefly stated, the facts produced at trial showed that Petitioner admitted to robbing the victim at gunpoint, and, along with Thomas, took the victim to the woods where the victim was struck with a hammer, tied to a tree, made to lie in a shallow grave, beaten and jabbed with a shovel in the head, throat and chest, shot with a pistol and buried alive, during which time the victim was pleading with Petitioner and Thomas to stop. Stanley v. State, 240 Ga. 341, 241 S.E.2d 173 (1977), cert denied, 439 U.S. 882 (1978).

On appeal to the Supreme Court of Georgia, Petitioner's convictions and death setences for murder and kidnapping with bodily injury were affirmed, but the death penalty imposed for Petitioner's armed robbery conviction was vacated, not for lack of evidence, but because "a person cannot legally be convicted and sentenced for both a felony murder and the lesser included felony on which that felony murder conviction is based, the armed robbery in this case." 240 Ga. at 343.

Petitioner filed a state habeas corpus petition in the Superior Court of Butts County, Georgia. The Superior Court of Butts County denied Petitioner relief on July 26, 1979. A certificate of probable cause to appeal was denied by the Supreme Court of Georgia and the petition for writ of certiorari to this Court was denied on February 19, 1980 in Stanley v. Zant, 444 U.S. 1103 (1980).

Next, Petitioner filed a successive petition for writ of habeas corpus in the Superior Court of Butts County, Georgia. The Superior Court of Butts County denied the successive petition for writ of habeas corpus, finding that all claims for relief raised in the petition had either already been ruled on, been waived, or were legally insufficient. This order of the Superior Court of Butts County was entered on October 14, 1980.

Next, Petitioner filed an application for federal habeas corpus relief pursuant to 28 U.S.C. § 2254 in the United States District Court for the Middle District of Georgia, Thomasville Division. Reviewing each of Petitioner's allegations, the United States District Court for the Middle District of Georgia denied Petitioner the relief sought and dismissed the petition for a writ of habeas corpus in an order dated June 11, 1981.

Petitioner appealed to the United States Court of Appeals for the Eleventh Circuit and following oral argument, the court affirmed the judgment of the district

court denying Petitioner federal habeas corpus relief in Stanley v. Zant, 697 F.2d 955 (11th Cir. 1983).

Petitioner subsequently filed the instant petition for writ of certiorari in this Court challenging the findings of the United States Court of Appeals for the Eleventh Circuit in its decision affirming the denial of federal habeas corpus relief.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

I. THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT PROPERLY FOUND THAT, UNDER THE FACTS OF THIS CASE, PETITIONER HAD FAILED TO PROVE THAT HIS TRIAL ATTORNEY RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE, WITHOUT REFERENCE TO THE ISSUE OF "PREJUDICE."

Petitioner asserts that the record establishes that Petitioner was rendered ineffective assistance of counsel at the sentencing phase of his trial due to a failure to present "mitigating evidence" during this portion of the trial. Petitioner argues that the United States Court of Appeals for the Eleventh Circuit incorrectly found that the Petitioner had the burden of proving that his attorney rendered ineffective assistance, but Petitioner alleges that, assuming that he has such a burden, he satisfied his burden of proof.

The United States Court of Appeals for the Eleventh Circuit applied the principles of Washington v. Strickland, 693 F.2d 1243 (5th Cir. 1982) (Unit B en banc) in determining that Petitioner had failed to establish that his trial attorney rendered ineffective assistance of counsel during the sentencing phase. Stanley v. Zant, supra at p 958. However, as the United States Court of Appeals for the Eleventh Circuit determined, the dual showing required is that Petitioner first show ineffective assistance of counsel, and second, Petitioner must show "actual and substantial prejudice" to his case. The United States Court of Appeals for the Eleventh Circuit did not reach the issue of prejudice, but simply reached the proper conclusion that Petitioner had failed to establish under the facts of this case that his trial attorney was ineffective. Id at 958.

The United States Court of Appeals for the Eleventh

Circuit described Petitioner's burden with respect to his ineffective assistance of counsel claim as follows:

> Stanley's burden, therefore, is to show that his counsel was not rendering reasonably effective assistance given the totality of the circumstances. Washington v. Strickland, 693 F.2d at 1250-51; United States v. Killian, 639 F.2d 206, 210 (5th Cir.) cert denied, 451 U.S. 1021, 101 S.Ct. 3014, 69 L.Ed.2d 394 (1981); Mays v. Balkcom, 631 F.2d 48, 52 n. 1 (5th Cir. 1980). Reference to the totality of circumstances implies that we look at counsel's overall performance rather than dissect his advocacy and second guess each individual action or inaction. The latter exercise would accomplish little, since the defendant is not guaranteed errorless counsel.

Id at 962.

Although noting that the panel opinion in Washington v. Strickland, supra reached a result similar to that ultimately occurring in Stanley v. Zant, supra the United States Court of Appeals for the Eleventh Circuit stated "this circuit has not before resolved the precise issue presented by Stanley." Id at 963. However, Respondent submits that the holding of the United States Court of Appeals for the Eleventh Circuit, in which it found that Petitioner had not met his burden of establishing ineffective assistance of counsel, was based on sound legal principles and was authorized by the record as developed in the state and federal courts.

First, in viewing this Court's decisions in Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978); and Woodson v. North Carolina, 428 U.S. 280 (1976), the United States Court of Appeals for the Eleventh Circuit concluded that:

> Acknowledgment of the importance of character testimony and the right to have it considered by the sentencing body when presented does not of itself speak to the duty of counsel. As we discussed below, the posture of a given case may well justify, if not require, an effective attorney to refrain from presenting such evidence. Stanley v. Zant, supra, at 960-961.

Having found there to be no absolute requirement that an attorney present mitigating evidence at the sentencing phase of a trial in which the death penalty is being sought, the United States Court of Appeals for the Eleventh Circuit went on to correctly note, as cited above, that Petitioner's burden was to establish under the totality of the circumstances that his trial attorney did not render reasonably effective assistance. This was the appropriate burden of proof and is in accordance with the general legal principle that a Petitioner has the burden of establishing a denial of his constitutional rights. See Lakos v. Capps, 528 F.2d 576 (5th Cir. 1976); Burston v. Caldwell, 506 F.2d 24 (5th Cir.), cert denied, 421 U.S. 990 (1975); Clayton v. Blackburn, 578 F.2d 117 (5th Cir. 1978).

The court went on to properly analyze the scope of counsel's duty to investigate mitigating evidence for presentation during the sentencing phase of a capital case and stated, "in many cases, counsel could reasonably

conclude that such evidence would be of little persuasive value or that it would cause more harm than good by opening the door for harmful cross-examination or rebuttal evidence. (cites omitted)." Id at 965.

The United States Court of Appeals for the Eleventh Circuit found support for this analysis in two Fifth Circuit cases discussing the scope of trial counsel's duty in this regard. See Williams v. Maggio, 679 F.2d 381 (5th Cir. 1982 (en banc) and Gray v. Lucas, 677 F.2d 1086 (5th Cir. 1982).

In reviewing the evidence before that court, the United States Court of Appeals for the Eleventh Circuit made two major findings. First, the court properly noted that the record in the case suggested that Stanley's trial attorney did in fact consider the possibility of presenting character witnesses on Petitioner's behalf at the sentencing phase of the trial, because the state habeas corpus record indicated that Petitioner's attorney discussed this question with Petitioner and his mother. Id at 966. However, the court properly determined that it need not reach the question of whether the investigation satisfied the requirements in Washington v. Strickland, supra because even assuming counsel failed to conduct the requisite investigation into mitigating evidence, the court found that Petitioner had failed to establish that he did not receive effective assistance of counsel. Stanley v. Zant, supra at 966. The state habeas corpus court noted that mitigating evidence was before the jury, as it was introduced at the guilt-innocence phase of Petitioner's trial. During the main trial, Petitioner's mother testified (Trial Trancript, Vol. II, pp. 450-453); the Petitioner gave some mitigating type evidence in his testimony (Trial Transcript, Vol. II, pp. 453-455); Petitioner's low intellectual capacity and reading ability was before the jury (Trial Transcript, Vol. II,

pp. 110-122); and Doctor Smith testified concerning Petitioner's mentality and his psychiatric makeup. (Trial Transcript, Vol. II, pp. 150-164). Therefore, this evidence was before the jury for its consideration in mitigation and showed that Petitioner's trial attorney did introduce mitigating evidence which could be considered by the jury, but chose to introduce this type evidence during the guilt-innocence phase of the trial and chose not to repeat it at the sentencing phase of the trial.

The United States Court of Appeals for the Eleventh Circuit examined the testimony of certain witnesses at Petitioner's state habeas corpus proceeding during which they stated that they would have testified, if asked to do so, concerning Petitioner's character at the sentencing phase of his trial. Stanley v. Zant, supra at 967. The United States Court of Appeals for the Eleventh Circuit properly reviewed in detail the content of these persons' testimony as given at the state habeas corpus proceeding (Stanley v. Zant, supra at 967-968), and concluded that:

> In Stanley's case an investigation into character evidence would have revealed nothing more than general affirmations from family members and friends that Stanley had been, at a time remote from the events giving rise to the charge, a basically good and responsible child and young adult.

Stanley v. Zant, supra at 966-967.

Having made this review of the applicable legal authority concerning this issue and having reviewed the record as developed at Petitioner's trial and at the state habeas corpus hearing, the court held as follows with reference to Petitioner's allegation of ineffective assistance of counsel at the sentencing phase:

> When we know nothing of counsel's strategy, when the evidence not presented consists of general statements by family members that the defendant was, at a point in time, remote from the events in question, a 'good boy' and when such evidence is cumulative of evidence presented during the guilt phase of the trial, then the 'effectiveness' prong of Washington v. Strickland has not been satisfied.

Stanley v. Zant, supra at 969.

Respondent submits that this holding was in accord with appropriate legal authority interpreting the right to effective assistance of counsel and was authorized by the facts as developed in the state courts, thereby presenting nothing for consideration by this Court.

II. THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT PROPERLY DETERMINED THAT THERE WAS NO SHOWING THAT PETITIONER'S STATEMENT WAS NOT FREELY AND VOLUNTARILY GIVEN SO AS TO WARRANT ITS EXCLUSION FROM EVIDENCE BASED ON THE FACTS BEFORE THIS COURT.

Petitioner contends that his incriminating statement was improperly admitted into evidence as he contends that the "waiver of counsel" form signed by Petitioner does not satisfy the requirements of Miranda v. Arizona, 384 U.S. 436 (1966), that prisoners be meaningfully advised of their right to counsel. The United States Court of Appeals for the Eleventh Circuit credited the finding of the district court that Petitioner "'was thoroughly advised of his right to consult with an attorney before making any statement and that he understood his rights and was willing to make a statement freely and voluntarily.'" Stanley v. Zant, supra at 972.

The record establishes that Petitioner was arrested for the murder of Clifford Floyd on April 14, 1976. (Trial Transcript, Vol. II, p. 92). Petitioner was brought to the Sheriff's office where he was advised of his rights by Sheriff Phillips and Billy Turner of the Georgia Bureau of Investigation. (Trial Transcript, Vol. II, p. 93). At that same time, Petitioner signed a waiver of counsel form after it had been read to him and after he had the opportunity to read it for himself. (Trial Transcript, Vol. II, p. 93). Petitioner was confronted with a cigarette lighter which had been found near the grave of the victim. When Petitioner identified the lighter as being his, the brief interrogation ceased. (Trial Transcript, Vol. II, p. 96).

On April 17, 1976 Petitioner was once again explained his rights orally, the waiver of counsel form was then given to him to read for himself. (Trial Trancript, Vol. II, p. 97). The Sheriff had previously determined that Petitioner had completed the eleventh grade in high school and was able to read. (Trial Transcript, Vol. II, p. 94). As on the earlier occasion, Petitioner appeared to understand his rights. (Trial Trasncript, Vol. II, p. 97). At the second session on April 17, Petitioner made a statement which was taped by the Sheriff and GBI Agent Turner. (Trial Transcript, Vol. II, p. 98). The statement was freely and voluntarily given; the interview took no more than thirty minute. (Trial Transcript, Vol. II, p. 104).

In the taped interview, it is clear that Petitioner was meticulously advised of his right to consult with an attorney before making any statements; it was carefully explained to him that if he could not afford an attorney, one would be apointed for him by the court and he had the right to confer with such appointed counsel, if he so chose, before making any statement. (Trial Transcript,

Vol. II, p. 208). Eight times at the beginning of the interview, Petitioner indicated that he understood his rights and was willing to make a statement freely and voluntarily. (Trial Transcript, Vol. II pp. 207-9).

Based on this evidence, the United States Court of Appeals for the Eleventh Circuit found that , "the contents of the form and tape recorded interview nowever, make it absolutely clear that Stanley was advised fully and correctly of his rights and that he acknowledged that he understood separately with respect to each provision." Stanley v. Zant, supra at 972.

The United States Court of Appeals for the Eleventh Circuit properly found that Petitioner's criticism of the caption of the waiver of counsel form was not supported by this Court's decision in Miranda v. Arizona, supra or Brewer v. Williams, 430 U.S. 387 (1977).

Based on the above and foregoing, this allegation presents nothing for the consideration by this Court.

III. THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT PROPERLY FOUND THAT THIS COURT'S DECISION IN GODFREY V. GEORGIA, 446 U.S. 420 (1980), DID NOT REQUIRE A LIMITING INSTRUCTION AND FURTHER PROPERLY DETERMINED THAT PETITIONER HAD FAILED TO ESTABLISH THAT ANY ALLEGED DEFICIENCIES IN THE INSTRUCTION ON THE SEVENTH AGGRAVATING CIRCUMSTANCE WARRANTED THE GRANTING OF HABEAS CORPUS RELIEF.

Petitioner contends that this Couts's decision in Godfrey v. Georgia, 446 U.S. 420 (1980) requires that limiting instructions be given when the seventh aggravating circumstance as contained in O.C.G.A. § 17-10-30(b)(7); Ga. Code Ann. § 27-2534.1(b)(7), is alleged. First, Respondent submits that the United States Court of Appeals for the Eleventh Circuit was correct in determining that this Court's decision in Godfrey v. Georgia, supra did not hold that a limiting instruction on

the seventh aggravating circumstance is required. Stanley v. Zant, supra at 971. As the court properly stated, "the inquiry in Godfrey focused on whether the evidence in that case satisfied the criteria previously established by the Georgia Supreme Court for application of § (b)(7) by stressing the factual setting that gave rise to the case, the Supreme Court in Godfrey was not required to resolve the issue of whether a limiting instruction of § (b)(7) is mandated . . . .." Id.

However, the United States Court of Appeals for the Eleventh Circuit did not merely stress that it did not read this Court's decision in Godfrey v. Georgia, supra as requiring a limiting instruction, but went further and found that even assuming that such an instruction was required, the record in this case did not warrant the granting of habeas corpus relief. Id. The court properly distinguished the instructions given in this case from those given in Godfrey v. Georgia, supra. The court concluded the following with reference to the differences between the intructions in Petitioner's case and that given in Godfrey v. Georgia:

> The instruction given Stanley's jury was significantly different. Section (b)(7) was stated in terms of the state's contention: that the offenses were 'outrageously and wantonly vile, horrible and inhuman, in that the offenses involved Defendant's depravity of mind and torture to the victim.' (emphasis added). The jury reported a finding beyond a reasonable doubt in the same language "the offense involved depravity of mind and torture to the victim." (emphasis added).

> The vice to which justice Stewart pointed is simply absent. Under their instructions Stanley's jury could not fix punishment at death unless they found beyond a reasonable doubt that his depravity of mind resulted in torture to his victim. Godfrey's jury was free to fix punishment at death even in the absence of any abuse to his victim before death and, indeed, they did so. Id at 971-972.

With reference to the failure to define the word "torture," the United States Court of Appeals for the Eleventh Circuit properly determined that it was almost undisputed that extreme physical abuse was present in this case. Id.

The United States Court of Appeals for the Eleventh Circuit recognized the decision of this Court in Engle v. Isaac, 456 U.S. 107 (1982), which recognized that the writ of habeas corpus is to be used to correct convictions where principles of fundamental fairness have been violated. Id. In light of the record before the court, the United States Court of Appeals for the Eleventh Circuit properly found that Petitioner's challenges to the instructions on the seventh aggravating circumstance failed to establish a denial of fundamental fairness so as to require the granting of habeas corpus relief. This contention presents nothing for review by this Court.

CONCLUSION

For all of the above-stated reasons, Respondent asserts that none of these issues, viewed in light of the record in this case, requires the granting of a petition for writ of certiorari by this Court and that therefore, this petition for writ of certiorari should be denied.

Respectfully submitted,

MICHAEL J. BOWERS
Attorney General

JAMES P. GOOGE, JR.
Executive Assistant Attorney General

Marion O. Gordon
MARION O. GORDON
First Assistant Attorney General

William B. Hill, Jr.
WILLIAM B. HILL, JR.
Senior Assistant Attorney General

Susan V. Boleyn
SUSAN V. BOLEYN
Assistant Attorney General

Please serve:

SUSAN V. BOLEYN
1 2 State Judicial Building
40 Capitol Square, S. W.
Atlanta, Georgia 30334
(404) 656-3397

CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the within and foregoing Brief, prior to filing the same, by depositing a copy thereof, postage prepaid, in the United States Mail, properly addressed upon:

Mr. Melvin L. Wulf
565 Fifth Avenue
New York New York 10017

Mr. Neil Bradley
American Civil Liberties Union Foundation
Suite 355
52 Fairlie Street N.W.
Atlanta, Georgia 30303

This 29th day of July, 1983.

Susan V. Boleyn /ps
SUSAN V. BOLEYN